

# An Analysis of the Execution of Judgments and Follow-up Mechanism Under the African Court on Human and Peoples' Rights: Lessons from the European Human Rights System

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## Abstract

The African Court is a critical forum under the African human rights system. Under the Protocol which establishes the African Court, member states have an obligation to comply with the court's judgments and must guarantee their execution. However, states rarely comply with the judgments of this court. In contrast, judgments under the European human rights system are largely complied with. This article analyses and evaluates the monitoring and supervision of the execution of judgments of the African Court and the European Court. It analyses the supervision mechanisms employed by the African Union's organs such as the Assembly of Heads of State and Government, the Executive Council and the African Court. These monitoring and enforcement mechanisms are compared to the European mechanisms employed by the Committee of Ministers, the European Court, and other bodies like the Parliamentary Assembly. The article contends that the monitoring and supervision mechanisms under the European human rights system are detailed, coherent, well established, specialised and effective as compared to the mechanisms in Africa. In that regard, the article proposes lessons that can be adopted to strengthen the African human rights system.

**Keywords:** Execution of judgments; monitoring and supervision mechanisms; African Court; European Court; non-compliance; African human rights system.

## Introduction

One of the problems facing the African human rights system is non-compliance with judgments and decisions of the African Court on Human and Peoples' Rights ('the African Court.')

<sup>1</sup> The mechanisms to monitor and supervise the execution of judgments are important because they ensure that victims of human rights violations have a remedy.<sup>2</sup> The effectiveness of a human rights system depends mostly on execution of judgments and decisions. Execution of judgments enhances the system's dignity and effectiveness. Compliance with courts' judgments reduces the cases of human rights abuses.<sup>3</sup> This article analyses and evaluates the mechanisms which monitor and supervise the execution of judgments and decisions under the African human rights system, in particular, the African Court.<sup>4</sup> It carries out a comparative analysis of the mechanisms under the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court ('the Protocol'), with the mechanisms under the European Convention on Human Rights (European Convention and its Protocols).<sup>5</sup> Its aim is to get lessons from the European system and to influence reforms under the African human rights system. The article argues that the African human rights system has institutional weaknesses which need reform, and it must take a cue from the mechanisms adopted under the European human rights system.

## An Overview of the African Human Rights System

The African human rights system has various organs and institutions established to promote human rights. Africa's main organ under the system is the African Union which replaced the Organisation of African Unity (OAU). In the African human rights system,

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- 1 See the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights (adopted in Addis Ababa, Ethiopia, on 10 June 1998 and entered into force on 25 June 2004).
  - 2 UNGA 'Basic Principles and Guidelines on the Right to a Remedy for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law' (16 December 2005) UN Doc A/res/60/147 VII para 11. See also Ingrid Nifosi-Sutton, 'The Power of the African Court on Human and Peoples' Rights to Order Specific Non-Monetary Relief: A Critical Appraisal from a Right to Health Perspective' (2010) 53 *Harvard Human Rights J* 73 and Sonja Starr, 'Rethinking "Effective Remedies": Remedial Deference in International Courts' (2008) 83 *New York Univ LR* 694.
  - 3 *Final Resolution in Stran Greek Refineries and Stratis Andreadis v Greece* (Final Resolution DH (97) 184). See also Oette Lutz, 'Bridging the Enforcement Gap: Compliance of States Parties with Decisions of Human Rights Treaty Bodies' (2010) 16 *Interights Bulletin* 51.
  - 4 See the Protocol (n 1). The court's first judges were sworn in in 2006 in Banjul, The Gambia. The seat of the African Court is in Arusha, Tanzania. However, the African Court may be replaced by the African Court of Justice and Human Rights as soon as its Protocol enters into force.
  - 5 The European Court is a supranational or international court set up in 1959. It rules on individual or state applications alleging violation of civil and political rights. The European Court is established under Art 19 of the European Convention. Under Art 32, the court has jurisdiction to hear matters concerning the interpretation and application of the Convention and its Protocols.

there is an African Court whose jurisdiction extends to the states which have ratified the Protocol. As of April 2020, thirty states have accepted its jurisdiction. Complaints to the African Court may be brought by the member states, the African Commission and African intergovernmental organisations. In addition, the African Court determines cases and disputes submitted to it on the interpretation and application of the African Charter or other relevant human rights instruments ratified by the states concerned.<sup>6</sup> Similarly, it is intended that an African Court of Justice and Human Rights determine disputes arising from all the African Union instruments.<sup>7</sup>

Furthermore, there is an African Commission on Human and Peoples' Rights ('the African Commission') which was created under Article 30 of the Charter. Its duty is to promote human rights.<sup>8</sup> The African Commission has created Committees, Working Groups and Rapporteurs such as the Committee for the Prevention of Torture in Africa, the Special Rapporteur on Rights of Women and the Working Group on Economic, Social and Cultural Rights.<sup>9</sup> There are, however, other treaty bodies like the Committee of Experts on the Rights and Welfare of the Child.<sup>10</sup> Moreover, the system has other sub-regional mechanisms like the Economic Organisation of West African States (ECOWAS), the Southern African Development Community (SADC) and the East African Community (EAC) which have their own courts. Apart from sub-regional mechanisms, there are various institutions which assist in the promotion of human rights. These include the Economic, Social and Cultural Council (ECOSOCC) and the Secretariat of the African Peer Review Mechanism (APRM).

In cases of extreme gravity and urgency, the African Court can grant such provisional measures as it deems necessary in order to avoid irreparable harm to the victims of the violation.<sup>11</sup> The power to prescribe interim measures is exercised by the court at the request of a party to the case, the African Commission or the African Court on its own

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6 Article 12 of the Protocol.

7 African Union, Protocol on the Statute of the African Court of Justice and Human Rights, 1 July 2008.

8 Article 45(1) of the African Charter.

9 The Committee for the Prevention of Torture in Africa was created by the adoption of Resolution 61 of the 32nd Ordinary Session of the African Commission in October 2002. Resolution 158 adopted at the 46th Ordinary Session in November 2009 changed the name from Robben Island Guideline for Monitoring Committee to Committee for the Prevention of Torture in Africa. The Special Rapporteur on the Rights of Women was established by the African Commission at the 23rd Ordinary Session held in Banjul, The Gambia in April 1998 while the Working Group on Economic, Social and Cultural Rights was established by the African Commission by the adoption of Res 73 at the 36th Ordinary Session held in Dakar, Senegal from 23 November to 7 December 2004.

10 See Art 32 of the African Charter on the Rights and Welfare of the Child, CAB/LEG/24.9/49. This Charter entered into force on 29 November 1999.

11 Article 27(2) of the Protocol. The first provisional measure was issued in the African Commission on *Human Peoples' Rights v Great Socialist People's Libyan Jamahiriya* App No 004/2-11 (25 March 2011) para 13.

accord.<sup>12</sup> States have a duty to comply with judgments in any matter to which they are parties subject to the time limits specified in the order.<sup>13</sup> As of May 2020 the court has issued about forty one orders for provisional measures.<sup>14</sup> Although provisional measures have achieved considerable success, they have been affected by non-compliance.<sup>15</sup>

After concluding each case, the African Court issues judgments and notifies the Executive Council which has the responsibility of monitoring the execution of judgments on behalf of the Assembly of Heads of State and Government (the Assembly).<sup>16</sup> The African Court's judgments are binding. Furthermore, the state concerned must comply with the judgment and must guarantee its execution.<sup>17</sup> This court's first judgment on merits was *Tankanyika Law Society and the Legal and Human Rights Law Centre and Reverend Christopher Mtikila v Tanzania*.<sup>18</sup> As of May 2020, the Court had received 256 cases from individuals, twelve from NGOs and three applications from the African Commission. If a state does not comply with the African Court's judgment, the court can compile a report notifying the Executive Council about the non-compliance. To date the Court has only published one report notifying the Executive Council about Libya's non-compliance in terms of Article 31 of the Protocol. Rule 51 of the Rules of Procedure of the African Court notes that the Article 31 report may refer to interim measures of the Court and that if the measures have not been implemented, the court shall make such recommendations as it deems fit.<sup>19</sup> The African Court can also invite parties to provide it with information on any issue relating to the implementation of the interim measures.<sup>20</sup>

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12 Rule 51(1) of the Rules of the Court. For example, in *African Commission on Human and Peoples' Rights v Libya* para 9–12 the court made interim measures proprio motu.

13 Article 30 of the Protocol.

14 The latest case with a provisional measure is *Guillaume Kigbafori and Others v the Republic of Côte d'Ivoire* App No 012/20. See the cases of the *African Commission on Human and Peoples' Rights v Great Socialist Peoples' Libyan Arab Jamahiriya* App No 004/2011 (25 March 2011), *African Commission on Human and Peoples Rights v Republic of Kenya* App No 006/2012 and *Lohelssa Konate v Burkina Faso* App No 004/2013 in which provisional orders were issued.

15 Frans Viljoen, *International Human Rights Law in Africa* (OUP 2007) 326. See also Fatsah Ouguergouz, *The African Court on Human and Peoples' Rights: A Comprehensive Agenda for Dignity and Sustainable Democracy in Africa* (Brill 2003) 639.

16 *ibid.*

17 Article 30 of the Protocol to the African Charter.

18 *Tankanyika Law Society and the Legal and Human Rights Law Centre and Reverend Christopher Mtikila v Tanzania* App No 009& 011/2011 (14 June 2013).

19 Rules 51(4) Rules of Procedure of the African Court.

20 *ibid.*, Rule 54(5).

## Execution of Judgments and Decisions in Africa: Monitoring and Supervision Mechanisms

The African human rights system has various mechanisms to ensure the execution of judgments and decisions of the African Court. To ensure compliance, various bodies have been established. These include the Assembly and the Executive Council.

### **The Assembly of Heads of State and Government**

Collective enforcement is a key principle under the African human rights system. In this mechanism, a state's non-compliance is discussed by the Assembly. In addition, the Assembly receives reports of violations of human rights and directs the African Commission to investigate and come up with findings and recommendations. Annual reports are submitted to the African Union by the African Court, accompanied by recommendations on non-compliance by member states.<sup>21</sup> Furthermore, the Assembly determines the AU's policies, establishes its priorities, adopts its annual programme and monitors the implementation of its policies and decisions. Apart from determining policies, the Assembly can also impose sanctions or take political or economic measures against a state which refuses to comply with the decisions of the African Court.<sup>22</sup> Moreover, the Assembly has the power to direct its member states to comply with judgments and orders of the court.

There are other principles of the African Union which can help to generate compliance with the African Court's judgments. The African Union has the right to intervene in a member state pursuant to a decision of the Assembly in respect of grave circumstances, namely; war crimes, genocide and crimes against humanity.<sup>23</sup> Apart from that, the African Union espouses the principle of respect for democratic principles, the rule of law and good governance.<sup>24</sup> In the same vein, the African Union calls upon member states to respect the sanctity of human life, it condemns and rejects impunity. It is through this emphasis on the rule of law that states are encouraged to comply with the African Court's decisions. Compliance with the decisions of the court puts an end to impunity.

### **Executive Council**

The Protocol and the Rules of Procedure of the African Court bestow the duty to monitor the execution of judgments on the Executive Council because the latter has no time to

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21 Article 31 of the Constitutive Act of the African Union, adopted in Lomé, Togo by the 36th Ordinary Session of the Assembly of Heads of State and Government on 11 July 2000 and entered into force on 26 May 2001.

22 Article 23(2) Constitutive Act.

23 Article 4(h) and (m) of the Constitutive Act.

24 *ibid* Art 4(m).

carry out such functions.<sup>25</sup> The functions of the Council are detailed in Article 13 of the Constitutive Act. Rule 5(1)(d) of the Rules of Procedure of the Executive Council provides that the Council shall monitor the implementation of policies, decisions and agreements adopted by the Assembly.<sup>26</sup> In addition, Rule 5(1)(g) gives the Executive Council the power to take appropriate action on issues referred to it by the Assembly. This means that if the Assembly makes a decision on non-compliance with the judgment of the African Court by a member state, the Executive Council may take action on that decision.

Furthermore, Rule 5(1)(n) of the Rules of Procedure of the Executive Council provides that the latter may set up ad hoc committees and working groups as it may deem necessary. This is an avenue which can be explored by the Executive Council to supervise and monitor the execution of the African Court's judgments. This power may be exercised in cases of grave violations or in cases which are urgent and may result in irreparable harm. In its sessions, the Executive Council adopts its agenda from items which the Assembly has referred to it.

## State Reporting

Primarily, state reporting is not a mechanism for monitoring the enforcement of judgments by member states. However, it can contribute to the enforcement of the African Court's judgments. In this mechanism, a member state under a specific treaty or charter body reports on its compliance with treaty obligations from time to time.<sup>27</sup> There is an assumption that the publicity that comes with state reporting will have a positive impact on the state's compliance with human rights norms because states do not want to be seen to be violating human rights.<sup>28</sup>

## Evaluating the African Human Rights Enforcement Mechanisms

Generally, states rarely comply with the African Court's decisions. For example, Tanzania has not implemented the decisions of the African Court in several cases.<sup>29</sup> In addition, Tanzania has told the court that it is unable to implement several judgments.<sup>30</sup> Furthermore, Libya has not responded to the court on the measures it has taken in several

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25 Ben Kioko, 'The African Union and the Implementation of the Decisions of the African Court on Human and Peoples' Rights' (2004) 15 *Interights Bulletin* 8.

26 Rules of Procedure of the Executive Council ASS/AU/2(I)-(b).

27 See Article 62 of the African Charter.

28 Jack Donnelly, *International Human Rights* (2nd edn, Routledge 1998) 75.

29 See for example *Wilfred Onyango Nganyi and Nine Others v Tanzania* App No 006/2013.

30 *John Lazaro and Eight Others v Tanzania* App No 003/2016 and *Erodius Rulachura and Nine Others v Tanzania* App No 004/2016. See also the Mid-Term Report of the African Court on Human and Peoples' Rights (1 January–30 June 2017).

cases.<sup>31</sup> Furthermore, Libya has failed and consistently refuses to comply with the court's orders for provisional measures and judgments. This is in spite of several reminders from the court.<sup>32</sup> The African Court adopted an interim report noting that Libya has failed to comply with a court judgment, and it requested the Assembly to take action or any appropriate measures as it deems fit, but the Assembly did not take action.<sup>33</sup>

Among many other reasons, states do not comply with the African Court's judgments because of political abstentionism, that is, political leaders' strong belief in the principles of sovereignty, non-interference and dictatorship.<sup>34</sup> In addition, the political and social structure of the continent is the main reason why judgments are rarely complied with. The African states are patrimonial as opposed to rational legal states.<sup>35</sup> Rational legal states derive their legitimacy from legality; have depersonalised authority and do not owe allegiance to anyone.<sup>36</sup> Patrimonial states have personalised rule and their authority is derived from the discretion and personality of the ruler. In most cases, the rulers overemphasise the notion of sovereignty and non-interference resulting in non-compliance with the African Court's judgments.

Furthermore, it should be noted that states rarely respect their own courts and are therefore unlikely to enforce judgments of supranational bodies.<sup>37</sup> States find it difficult to give up their sovereignty to supranational courts.<sup>38</sup> In the same vein, because of the fear of losing votes, states simply do not comply if the court order does not serve their national interests.<sup>39</sup> Significantly, non-compliance is caused by the absence of direct access to the court by individuals and NGOs. This is because individual and civil society participation is essential to ensure compliance.<sup>40</sup> A notable example is the participation

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31 See the case of *The African Commission on Human and Peoples' Rights v Libya* App No 003/2013 which was concluded on 3 June 2016.

32 See the Mid-Term Report of the African Court (n 30) para 45. See also Manisuli Ssenyonjo, 'Responding to Human Rights Violations in Africa: Assessing the Role of the African Commission and Court on Human and Peoples' Rights (1987-2018)' (2018) 7(1) *International Human Rights LR* 1-42.

33 African Court, 'Interim Report of the African Court Notifying the Executive Council of Non-Compliance by a State' (Interim Report on Libya) 17 May 2013. See the Mid-Term Report of the African Court (n 30) para 42.

34 Rowland Cole, 'The African Court on Human and Peoples' Rights: Will Political Stereotypes Form an Obstacle to the Enforcement of its Decisions' (2010) 43 *CILSA* 23, 30. See also CM Peter, 'The Proposed Court of Justice – Jurisprudential, Procedural, Enforcement Problems and Beyond' (1993) 1 *East African J of Peace and Human Rights* 117, 133.

35 *ibid* Cole 38.

36 *ibid*. See also Viljoen (n 15) 472.

37 Kofi Oteng Kufuor, 'Securing Compliance with the Judgments of the ECOWAS Court of Justice' (1996) 8 *African J of Intl and Comp L* 1, 7.

38 *ibid*.

39 Cole (n 34) 40.

40 *ibid*.

of an NGO complainant in *SERAC v Nigeria*, where SERAC kept on pushing, engaging the government, and it publicised the judgment until it was enforced.<sup>41</sup>

African states conspire to dilute or obstruct any meaningful discussion on non-compliance by member states.<sup>42</sup> The Assembly discusses the problem of non-compliance and considers reports on non-compliance, but it does not take action to ensure compliance. Perhaps the principle of non-interference in the internal affairs of its member states enshrined in Article 11 of the Constitutive Act precludes it from taking action.<sup>43</sup> For example, in the case of Libya, the Assembly and the Pan African Parliament emphasised the importance of African solutions and non-interference in Libya.<sup>44</sup> The Assembly seems to be reluctant to criticise one another on human rights violations, opting for a pat on the shoulder.<sup>45</sup> The idea of political solidarity appeals more to the Heads of States than effective enforcement.

The mandate of the Executive Council to monitor compliance with judgments of the Court succeeds or fails on the manner in which the Assembly treats non-compliance because the Executive Council is said to exercise that function on behalf of the Assembly. Like its master, the Executive Council does not make concrete measures or implement efficient mechanisms to ensure compliance with judgments. It has not adopted clear procedures to carry out its mandate. Although the Protocol provides that the Executive Council should monitor the compliance of states parties, no structure has been put in place so far to monitor execution and compliance with the court's judgments. The African Court is meant to ensure a comprehensive human rights supervisory mechanism and to examine whether the states give effect to their obligations and to make pronouncements on human rights violations perpetrated by member states.<sup>46</sup>

An example of the ineffectiveness of the Executive Council is the manner in which it handled the Libyan crises. In a report of the African Court to the Executive Council, the African Court sought to bring to the attention of the Executive Council the non-compliance by Libya with the court's provisional measures issued on 15 March 2013 in

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41 *The Social and Economic Rights Action Center et al v Nigeria* Communication No 155/96 (2001).

42 *ibid* 371.

43 Ben Nwabueze, *Constitutional Democracy in Africa* (Spectrum Books 2003) 83. The silence of the Constitutive Act on the role of the Assembly is an impediment to the effectiveness of the protection of human rights.

44 African Union, Decision on the Peaceful Resolution of the Libyan Crises, Extraordinary Assembly of the Union on the state of Peace and Security in Africa Ext/Assembly, AU/Dec (01.2011). See also Motion on the Security Situation in Libya, Pan-African Parliament (21 May 2011).

45 See Vincent Orlu Nmehielle, *The African Human Rights System: Its Laws, Practice and Institutions—International Studies in Human Rights Series Vol 69* (1st edn, Brill Nijhoff 2001) 443.

46 Gino Naldi, 'Observations on the Rules of the African Court on Human and Peoples' Rights' (2014) 14 African Human Rights LJ 367, 367.



the matter of *African Commission v Libya*.<sup>47</sup> The African Court requested Libya to report to it on the measures it had taken to implement the order within fifteen days from the date of receipt of the order.<sup>48</sup> However, Libya did not inform the court on the said measures even after extension of that period by a further fourteen days.<sup>49</sup> No concrete measures were taken by the Executive Council and no clear follow-up mechanisms were implemented.

The impact of state reporting in fostering compliance with judgments of the African Court is limited. Generally, states do not report timeously and when they eventually report, their reports lack relevant and sufficient information on the condition of human rights in their countries. As of May 2020 only eleven states have submitted all their reports to the African Commission. Nineteen states are late by one or two reports, eighteen states are late by three or more reports while seven states have not submitted any reports.<sup>50</sup> Worse still, even when a state submits its report, it takes years before the Commission considers it. An example is the case of Malawi who submitted its initial report on 19 July 2013, but the Commission considered the report on its 56th ordinary session held from 21 April to 7 May 2015 and eventually adopted it on its 57th session held on 4 to 18 November 2015. The fact that there are no punitive measures for failure to submit a report is the reason why some states take too long to submit or have never submitted any report.

Although the states have agreed to be bound by the decisions of the African Court under Article 30 of the Constitutive Act, there are no consequential provisions for non-compliance. Similarly, Article 23(2) of the Constitutive Act provides for sanctions against countries that fail to comply with the decisions and policies of the African Union. However, Article 23(2) of the Constitutive Act is not an effective enforcement mechanism but is a provision of general application which refers to sanctions against failure to comply with the African Union's policies and decisions. That provision cannot be directly invoked if a state fails to enforce the African Court's decisions. Article 23(2) has no special provision on the execution of the court's judgments. Worse still, the sanctions provided in Article 23(3) are not automatic but are imposed by the Assembly. This means the decision to impose sanctions is not legal but political, hence the enforcement of the African Court's decisions is left to the whims and caprice of the political realm.

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47 African Union, 'Interim Report of the African Court on Human and Peoples' Rights Notifying the Executive Council of Non-Compliance by a State' in accordance with Article 31 of the Protocol.

48 *ibid* para 4.

49 *ibid* para 5.

50 The states that have not submitted any reports are Comoros, Equatorial Guinea, Guinea-Bissau, São Tomé and Príncipe, Somalia, South Sudan and Morocco who recently joined the African Union.

The African human rights system has no teeth to enforce mechanisms provided in the African Charter.<sup>51</sup> Article 31 of the Protocol provides that the African Court must submit an annual report to the African Union, indicating the instances of non-compliance with its judgments. This is a naming and shaming mechanism. Be that as it may, it is unlikely that tyrants will care about public moral opinion.<sup>52</sup> In the end, the execution of the court's judgments depends on the undertaking and willingness of states to comply.<sup>53</sup>

There is no coherent or strategic approach for monitoring the execution of judgments of the African Court.<sup>54</sup> The African human rights system is not effective because the bodies which monitor the implementation of judgments do not believe that they are mandated to carry out such a role.<sup>55</sup> In addition, the monitoring is not carried out well or consistently. Those who are seized with the role are not clear on whether their roles are appropriate or not. They are not sure if they are best suited to discharge the duties or whether other organs should be monitoring the execution of judgments.<sup>56</sup> There is no coherent or holistic system in place. Furthermore, those working within and outside the African Court have acknowledged that monitoring the execution of judgments is not being carried out as per the expectations.<sup>57</sup>

## European Human Rights System: An Overview

The European Court was established under Article 19 of the European Convention and it oversees the implementation of the European Convention.<sup>58</sup> It is the main organ in enforcing human rights under the European human rights system.<sup>59</sup> In Europe, the execution of judgments is supervised by the Committee of Ministers ('the Committee'). The main instrument is the European Convention which came into force in 1953. There is also a Council of Europe which consists of forty-seven members; twenty-eight of

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51 Frans Viljoen and Lurette Louw, 'State Compliance with the Recommendations of the African Commission on Human and Peoples' Rights, 1994-2004' (2007) 101 *The American JIL* 1, 3.

52 Cole (n 34) 42.

53 *ibid.*

54 Rachel Murray, Debra Long, Victor Ayeni and Augustin Somé, 'Monitoring Implementation of the Decisions and Judgments of the African Commission and Court on Human and Peoples' Rights' (2017) 1 *African Human Rights Yearbook* 150, 162.

55 *ibid.*

56 *ibid.*

57 *ibid* 165.

58 European Convention on Human Rights, Rome 4 XI.

59 The European Court is a supra-national or international court set up in 1959. It rules on individual or state applications alleging violation of civil and political rights. Under Article 32, ECtHR has jurisdiction to hear matters concerning the interpretation and application of the ECHR and its Protocols.

them are members of the European Union. All members of the Council of Europe have ratified the Convention.

The European Court may grant declaratory judgments, that is, directions for implementation. These judgments give room for domestic authorities to decide the appropriate measures to be implemented and supervised by the Committee. In addition, a declaratory judgment lays down the court's opinion on the matter before it without ordering any of the parties to do anything.<sup>60</sup> The use of declaratory judgments as just satisfaction was first introduced in *Golder v UK*.<sup>61</sup> In the case of *Marckx v Belgium*, the court emphasised that its decisions are declaratory in nature.<sup>62</sup> This means that a state has a great leeway to choose the means and measures to implement in executing judgments although this is subject to supervision by the Committee. The European Court is one of the most successful human rights regimes that has made a meaningful impact on the lives of citizens.<sup>63</sup> Since member states agreed to abide by the European Convention and to support the principles it espouses, they will enforce the Convention's provisions. There is generally a high degree of compliance with judgments by the European Court.<sup>64</sup>

Under the European human rights system, states have an immediate obligation to implement the judgments of the European Court.<sup>65</sup> If the court finds that there has been violation of human rights, the respondent state must implement individual and general measures to stop the violation. In addition, the state is obliged to provide *restitutio in integrum* and to pay just satisfaction where it has been awarded.<sup>66</sup> Furthermore, states have an obligation to terminate a continuing violation.<sup>67</sup> There should be reparation which has the effect of restoring as far as possible the situation before the breach.<sup>68</sup> Moreover, a national administrative order which violated the European Convention may

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60 *Corfu Channel Case (UK v Albania)* (Merits) [1949] ICJ Rep, where the court declared that the British Navy had violated Albania's sovereignty.

61 *Golder v The United Kingdom* [Plenary] App No 4451/70 (ECHR 21 February 1975) 46.

62 *Marckx v Belgium Series* (ECHR 13 June 1979) para 58.

63 Mike Burstein, 'The Will to Enforce: An Examination of the Political Constraints upon a Regional Court of Human Rights' (2006) 24 Berkeley JIL 423. See also Douglass Cassel, 'Does International Human Rights Law Make a Difference?' (2001) 2 Chicago JIL 134 and Eric Posner and Jon Yoo, 'Judicial Independence in International Tribunals' (2005) 93 California LR 63–66.

64 Oete Lutz, 'Bridging the Enforcement Gap: Compliance of States Parties with Decisions of Human Rights Treaty Bodies' (2010) 16 Interights Bulletin 51.

65 *Vermeire v Belgium Series* App No 6833/74 (ECHR 13 June 1979) 214-C.

66 Deborah Forst, 'The Execution of Judgments of the European Court of Human Rights: Limits and Ways Ahead' International Constitutional LJ 14.

67 Georg Rees, 'The Effect of Decisions and Judgments of the European Court of Human Rights in the Domestic Legal Order' (2005) Texas International LJ 380. See also Costas Paraskeva, 'The Relationship Between the Domestic Implementation of the European Convention on Human Rights and the Changing Reforms of the European Court of Human Rights (with a case study on Cyprus and Turkey)' 2010 *Insentia* 85.

68 *Brumarescu v Romania* App No 28342/95 (ECHR 28 October 1999) 2001-1 para 19.

be revoked. Notable examples are deportation orders.<sup>69</sup> In other cases, states have reopened criminal proceedings as recommended by the Committee.<sup>70</sup> States have also been required to revise, revoke or issue administrative orders.<sup>71</sup>

## Monitoring and Supervision of the Execution of Judgments in Europe

In Europe, there are various organs which monitor state compliance with the European Court's judgments. The main organs are the Committee of Ministers, the European Court itself and the Parliamentary Assembly.

### The Committee of Ministers

In the Council of Europe, the Committee is a key decision-making body. It is composed of the Foreign Affairs Ministers of all the member states or their permanent diplomatic representatives in Strasbourg. It does all its work in four regular meetings every year. The duty of the Committee is to ensure that states comply with the European Court's judgments. This body has rules which assist it to supervise execution of judgments and it supervises execution of judgments at special human rights meetings and inscribes a judgment on its agenda without delay as soon as the judgment is transmitted to it.<sup>72</sup>

In addition, this Committee may ask a state to identify an authority to coordinate the execution of judgments because the ability of the state to execute judgments at national level is paramount.<sup>73</sup> In practice, states usually appoint a high-level government body or the Ministry of Justice to coordinate the execution of judgments. Since 2011, new working methods have been adopted to supervise compliance with judgments and the Committee has been empowered to speed up execution where there are problems.<sup>74</sup> The

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69 *Omojudi and AW Khan v The United Kingdom* App No 1820/08 (ECHR 31 January 2006).

70 Committee of Ministers of the Council of Europe 'Recommendation on the Re-examination or Re-opening of Certain Cases at Domestic Level Following Judgments of the European Court of Human Rights' Rec (2000) 2 (19 January 2000).

71 *Rodrigues Da Silva and Hoogkamer v Netherlands* App No 50435/99 (ECHR 31 January 2006).

72 Rules 2 and 3 of the Committee of Ministers on the Execution of Judgments and on the Terms of Friendly Settlement adopted by the Committee of Ministers on 10 May 2006 at the 964th Meeting of the Ministers' Deputies and amended on 18 January 2017 at the 1275th Meeting of the Ministers' Deputies.

73 Committee of Ministers of the Council of Europe, 'Recommendation on Efficient Domestic Capacity for Rapid Execution of Judgments of the European Court of Human Rights' CM/Rec (2002) 2 (6 February 2008). See also Maria Suchkov, 'An Analysis of the Institutional Arrangements with the Committee of Ministers and Within Certain Member States for Securing Enforcement of Judgments' 2011 European Human Rights LR 454.

74 Committee of Ministers of the Council of Europe, 'Supervision of the Execution of Judgments and Decisions of the European Court of Human Rights: Implementation of the Interlaken Action Plan/ Modalities of a Twin-Track Supervision System' CM/Inf/DH (2010) 37 (6 September 2010).

supervision of the execution of judgments by the Committee is a political and collective control mechanism.

Furthermore, the Committee gives priority to those cases which show a systematic problem. It invites a member state to inform it of the measures which it has taken or intends to take in executing a judgment.<sup>75</sup> The country remains on the agenda of the Committee at each human rights meeting until the state has satisfactorily executed it.<sup>76</sup> If the party concerned has taken all necessary measures to abide by the judgment, the Committee issues a final resolution.<sup>77</sup> Moreover, the Committee closely scrutinises the individual and general measures adopted or proposed by the respondent state. At times the Committee assists the state by identifying the individual and general measures that may be implemented. In most cases the Committee requires proof that the measures have been implemented.

### *The Two-Track Supervision Procedure*

In 2010, the Committee introduced a two-track procedure to create a transparent and efficient system of supervision. The two-track mechanism was put in place to reduce the burden of the Committee where there are no difficulties in the implementation of action plans. Subject to the supervision of the Committee, states have a margin of appreciation in deciding which measures to implement. The first track is the standard procedure. In this track, the Committee tries to find out if the party concerned has come up with and presented its action plan.<sup>78</sup> An action plan is a document in which the High Contracting Party concerned details the individual and or general measures it has taken to implement a judgment of the court. Where there are no measures, the action plan explains why the state has not come up with any measures. It contains details of what the state intends to do.

The second track is the enhanced supervision procedure in which the Committee supervises cases requiring urgent individual measures, pilot judgments and cases causing major structural problems.<sup>79</sup> Cases under the enhanced track are given more priority than those under the ordinary track. In the enhanced track, the Committee takes an active role to assist the state to adopt and implement the action plan. In principle, the Committee uses the twin-track mechanism in its supervision. However, if difficulties arise, the Committee may apply pressure on the state through other mechanisms. Before

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75 *ibid* Rule 6.

76 *ibid* Rule 7.

77 *ibid* Rule 17.

78 Committee of Ministers of the Council of Europe (n 74) para 12.

79 *ibid* para 8.

Protocol 14 was adopted, the Committee would use about four mechanisms to put pressure on states to execute judgments.<sup>80</sup>

## Diplomatic Pressure

Diplomatic pressure was used during the human rights meetings of the Committee in ordinary or extraordinary sessions. The Committee would engage states through special contacts between the Presidency of the Committee and the state authorities. During this process, the Committee would also liaise with national authorities. Their engagement of authorities would incite states to implement the judgments of the court.

### *Interim Resolutions*

Interim resolutions are adopted by the Committee under Rule 16 of the Rules of the Committee.<sup>81</sup> An interim resolution is used where the state has not yet adopted measures to implement a judgment and its purpose is to encourage the state to continue in its endeavours to execute a judgment.<sup>82</sup> The practice of interim resolutions was introduced in the case of *Yaccoub v Belgium*.<sup>83</sup> It was applied in the *Stran Greek Refineries and Stratis Andreadis v Greece* case in which the Committee sought to ensure that the Greek authorities pay default interest to guarantee just satisfaction.<sup>84</sup>

There are various forms of interim resolutions. The first one takes note that no measures have been taken and encourages the state to take steps to execute judgments.<sup>85</sup> In the second, the Committee notes the progress made and encourages the state to adopt measures in the future. In this resolution, the Committee may detail the measures which the state can adopt to execute the judgment. The third one is designed to threaten a state with more serious measures where the state has taken long to execute, as was the case in *Ilascu and Others v Moldova and Russia*.<sup>86</sup> The Committee may require a state to present a written report on measures adopted or an annual report on what it has achieved.

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80 Council of Europe, Protocol 14 to the European Convention for the Protection of Human Rights and Fundamental Freedoms Amending the Control System of the Convention, 13 May 2004, CETS 194.

81 Rule 16 of the Rules of the Committee of Ministers for the Supervision of the Execution of Judgments and of the Terms of Friendly Settlements, adopted by the Committee of Ministers on 10 May 2006 at the 964th meeting of the Ministers' Deputies and amended on 18 January 2017 at the 1275th meeting of the Ministers' Deputies.

82 For example, Committee of Ministers 'Interim Resolution' CM/ResDH (2010) 33 (4 March 2010) encouraging Turkey to pay an applicant whose rights under the Convention had been violated. Turkey had been ordered to pay just satisfaction in *Xenides-Arestis v Turkey* App No 46347/99 (ECHR 22 December 2005).

83 *Ben Yaccoub v Belgium Series* App No 9976 (ECHR 22 November 1987). See also Interim Resolution DH (88) 13 of 29 September 1988.

84 *Stran Greek Refineries* (n 3). See also the Committee of Ministers, 'Interim Res' DH (96) 251.

85 *ibid.* See also Committee of Ministers, 'Interim Resolution' Res-DH (2001) 79 of 26 June 2001.

86 *Ilascu and Others v Moldova and Russia* App No 48787/99 (ECHR 8 July 2004) VII.

In situations where a state refuses to execute judgments, the Committee may adopt interim resolutions on the progress of the execution or to express concern or make suggestions with respect to the execution.<sup>87</sup> Such resolutions invite the member state to comply with the judgment, note the progress made to execute the judgment, discuss possible means of executing the court's judgments, exert pressure on national parliaments and threaten a member state with more serious measures if the situation is urgent and there has been undue delay.<sup>88</sup>

### *Adoption of Decisions and Press Releases*

Adoption of decisions and press releases is a mechanism which is used to raise awareness of the problems of execution of the judgments where such problems are less serious. An example is the press release concerning the execution of judgments and the functioning of justice in Albania. It encouraged Albania to continue in its efforts to execute the judgment.<sup>89</sup> A press release publicises the difficulties faced in executing judgments. Furthermore, the Committee has resorted to the use of memoranda to explain in detail what has to be done in order to execute a judgment. The Committee has noted that it can provide guidance to national authorities in the process of executing judgments through practical advice. Furthermore, the Committee has called on the member states to share information on execution among themselves and has highlighted the need for an online global database with relevant and up to date information on the execution of judgments. Also proposed are yearly meetings to be held by government agents to examine specific issues of execution of judgments.

### *Suspension of the Rights of Representatives*

The Committee, in putting pressure on a state to execute judgments, may suspend the rights of representatives of a state or request that the state withdraws from the Council of Europe. This is an extreme measure which may counter further engagements with the

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87 *Ben Yacoub v Belgium* (n 83) 127-A, Interim Resolution DH (88) 13 of 29 September 1988 and Final Res DH (92) 58 of 10 November 1992.

88 Interim Resolution Res DH (2001) 79 of 26 June 2001 in the case of *Matthews v the United Kingdom* App No 24833/94. The United Kingdom had not implemented adequate measures for more than two years after the court's judgment. See also Interim Resolution Res DH (2001) 178 of 5 December 2001 concerning monitoring of prisoners' correspondence in Italy and CM/Res SDH (2007) 74 of 6 June 2007 on unreasonably lengthy proceedings in Greek administrative courts and the absence of an effective domestic remedy. Greece was urged to pass two Bills on acceleration of administrative court proceedings and to introduce an effective domestic remedy. An example is the resolution passed in the case of *Loizidou v Turkey* that is, Interim Resolution Res DH (2001) 80 of 26 June 2001. In the resolution the Committee of Ministers stressed that members should accept the compulsory jurisdiction of the ECtHR and the binding nature of its judgments. The Committee pledged to use all means available to ensure compliance by Turkey with the obligations under the judgment.

89 Committee of Ministers of the Council of Europe, 'Albania: Progress in the Execution of Judgments of the European Court of Human Rights Concerning Problems Relating to the Functioning of Justice' 934 (Press Release, 8 December 2009).

respondent state. It has been implemented only in part concerning Greece and the Committee has threatened to use this mechanism against Turkey after it failed to execute the *Loizidou v Turkey* judgment.<sup>90</sup>

## **Measures Introduced by Protocol 14 of the European Convention**

After the adoption of Protocol 14 to the European Convention, there emerged other mechanisms to monitor execution of judgments. These include among others referral to the court for interpretation, the infringement procedure and exclusion from the Council of Europe.

### *Referral to the Court for Interpretation*

Another follow up mechanism under the European human rights system is referral to the court for interpretation. There may be referral of a case to the European Court for it to interpret a final judgment where the decision of the court is not clear. This gives a court an opportunity to clarify its decision. When the interpretation is given the state is expected to execute the judgment. This mechanism helps states to execute the judgments of the court especially where the execution had been stalled by a lack of clarity.

### *Infringement Procedure*

As a follow up mechanism, the Committee may invoke the infringement procedure in terms of Article 46-4 of the European Convention. This mechanism is only applied in exceptional circumstances where the Committee and the High Contracting Party have failed to agree on the adequate measures the state must adopt to comply with a judgment. It is also employed where the state is unwilling or unable to adopt adequate measures to execute a judgment. In the mechanism, the court is called upon to issue a judgment on whether the state has failed to fulfil its obligations under Article 46-1. Such a finding has dire consequences for the state.

### *Exclusion from the Council of Europe*

A member's right to be represented may be suspended or the member can be requested to withdraw from the Council of Europe under Article 7 of the European Convention. Persistent failure to execute judgments may be seen as a serious violation of the rule of law which leads to exclusion from the Council of Europe.

## **Mechanisms of the European Court of Human Rights**

Although the Committee is the main organ of the Council of Europe responsible for execution of the European Court's judgments, the court has its own mechanisms, and it

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<sup>90</sup> *Loizidou v Turkey* App No 15318/89 (ECHR 18 December 1996).



takes part in the supervision of the process of execution of judgments by states. It does this through the practice of just satisfaction, indicating possible measures, pilot judgments and second judgments.

## Just Satisfaction

The European Court indirectly supervises execution of its judgments through the practice of just satisfaction under Article 41 of the European Convention. It has emphasised the need for just satisfaction where a party has violated the European Convention or its Protocols and the domestic remedies of a state are inadequate.<sup>91</sup> In its orders, the European Court defines the currency, interest, and the time within which it must be paid. Although the court used to reject requests for interest, it now grants default interest.<sup>92</sup> The limit for payment is usually three months and was set in the case of *Morreira de Azevedo v Portugal*.<sup>93</sup> Litigants are awarded damages for pecuniary and non-pecuniary damages. Reparation for non-pecuniary damages is intended to compensate moral injury and they were first awarded in *Ringeisen v Australia*.<sup>94</sup>

## Indication of Measures of Execution in Court Judgments

In practice the European Court has always given states a margin of appreciation to decide the general and individual measures to execute judgments with the view that it could only order compensation.<sup>95</sup> Recently, the court has indicated in its judgments the individual and general measures to be adopted.<sup>96</sup> It resorts to this mechanism where it is established that there is a systematic violation and where a certain set of individual and general measures constitute the only way to place the applicant where he or she would have found himself had there been no violation.<sup>97</sup>

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91 Article 41 of the Convention. See also Rule 60(1) of the Rules of the European Court. See also *De Vilde, Ooms and Versyp (Vagrancy cases) v Belgium* [Plenary] (Just Satisfaction) App No 2832/66, 2835/66, 2899/66 (ECHR 10 March 1972).

92 *Oneryiliz v Turkey* App No 48939/99 (ECHR 18 June 2002). See also *Sunday Times v UK* (Article 50) App No 6538 (ECHR 6 November 1980) 44.

93 *Moreira de Azevedo v Portugal* (Article 5) App No 11296/84 (ECHR 28 March 1991).

94 *Ringeisen v Austria* App No 2614/65 (ECHR 16 July 1971).

95 *Ireland v UK* App No 5310/71 (ECHR 18 January 1978).

96 *Segdovic v Italy* App No 56581/00 (ECHR 1 March 2006) II para 119 where it indicated that the reopening of domestic proceedings could be an adequate individual measure to fulfil Art 46 of the European Convention.

97 *Assanidze and Others v Georgia* App No 71503/01 (ECHR 8 April 2004) II para 490. See also *Illascu v Moldova and Russia* ECHR 2004-VII para 490 where the court ordered the release of prisoners following arbitrary detentions and *Driza v Albania* App No 10810/05, ECHR 2007-V para 122 where the court made a finding that the Albanian legal order was the reason for the systemic violation. It indicated that Albania must remove all obstacles to the award of compensation to ensure that the appropriate statutory, administrative and budgetary measures are adopted as a matter of urgency.

## Pilot Judgments

A pilot judgment is a mechanism through which the court participates in the execution of its judgments.<sup>98</sup> The European Court introduced pilot judgments as a procedure to identify the root cause of problems underlying repetitive cases and placing an obligation on the state to solve them. In a pilot judgment, the court identifies the problem and gives the state guidelines on the remedies required to solve it. In addition, the court can also adjourn related cases against a country on the condition that the state implements the required remedies to satisfy the judgment. Furthermore, pilot judgments are a case management strategy which effectively tackles workload by reducing the number of similar cases. This procedure was adopted in February 2011 by Rule 61 of the Rules of the European Court, for countries where there are systemic or structural problems.<sup>99</sup>

## Second Judgment

The European Court may deliver a second judgment on the same issue and it may make an observation on the measures that were adopted to execute a judgment related to the present case. In *Vermeire v Belgium* the court noted that Belgium had not taken sufficient measures to execute the earlier judgment in *Marckx v Belgium* in which it had stated that the law on children born out of wedlock or to unmarried mothers violated Article 8 and 14 of the European Convention.<sup>100</sup> In that regard, the court's role is not merely administrative but active. The European Court has demonstrated willingness to act when a new violation results from failure by the state to properly execute a previous judgment.<sup>101</sup> Furthermore, the court influences the implementation of its judgments by controlling the domestic courts' consideration of its jurisprudence when they apply a new law after a condemnation.<sup>102</sup> The court thus ensures that domestic courts correctly execute a previous judgment.

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98 This procedure was adopted in February 2011 by Rule 61 of the Rules of the European Court and the procedure was applied in the cases of *Alisic and Others v Bosnia and Herzegovina, Croatia, the former Yugoslav Republic of Macedonia, Serbia and Slovenia* ECHR App No 60642/08 (ECHR 16 July 2014) and *Hutten-Czapska v Poland* App No 35014/97 (ECHR 19 June 2006). In *Alisic* the state was accused of failing to reconstitute the applicants' foreign currency. The pilot procedure was closed after the state introduced new law leading to the closure of around 1850 similar cases.

99 *ibid.*

100 *Vermeire v Belgium* (n 65) paras 25–26. See also *Marckx v Belgium* (n 62).

101 *Greens and MT v The United Kingdom* Apps No 6004/08 and 60054/08 (ECHR 23 November 2010) para 5. Where the court stated that the new violation was as a result of failure by the respondent state to execute the judgment in *Case of Hirst (No.2) v United Kingdom* App No 74025/01 (ECHR 6 October 2005). It also observed that the measures adopted in the first case were inadequate.

102 In *Fabris v France* App No 16574/08 (ECHR 4 April 2012) para 75, it was observed that the domestic courts have a duty to ensure the full effect of the Convention standards as interpreted by the European Court.

## Parliamentary Assembly

Another body involved in monitoring the execution of judgments is the Parliamentary Assembly. Where a state is unwilling to execute judgments, the Parliamentary Assembly may require the Minister of Justice of the state concerned to give an explanation in person to members of the Parliamentary Assembly and it can adopt recommendations to the Committee and to the member states concerning the execution of certain judgments.<sup>103</sup> In addition, if a member state unnecessarily delays executing a judgment, the Parliamentary Assembly can hold urgent debates on the subject. Similarly, where a state neglects or refuses to execute judgments, the Parliamentary Assembly can open a monitoring procedure specifically for that state. Furthermore, it gives priority to those cases which concern significant structural problems and where there is an unacceptable delay in implementation.<sup>104</sup> Moreover, members of the Parliamentary Assembly can submit written questions to obtain explanations from the Committee on failure to execute certain judgments and the Committee is required to give written answers.<sup>105</sup> The Parliamentary Assembly has resolved to hold regular discussions about the execution of judgments.<sup>106</sup>

## Council of Europe Commissioner for Human Rights

The Commissioner of Human Rights is a non-judicial institution which promotes education in, awareness of and respect for human rights. The institution is a dynamic link between the Committee and the Parliamentary Assembly. The Commissioner has assumed a watchdog function through issuing papers, opinions, and recommendations.<sup>107</sup> In that regard the institution plays a vital role in ensuring execution of judgments by being a watchdog of the Committee and the Parliamentary Assembly.

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103 Resolution 1226 (2000) Execution of Judgments of the European Court of Human Rights, adopted by the Parliamentary Assembly on 28 September 2000 at its 30th sitting.

104 Committee on Legal Affairs and Human Rights, Sixth Report, 'Implementation of Judgments of the European Court of Human Rights' Document 11020 (18 September 2006).

105 Written Question No 402 Mr Clerfayt on the Non-Compliance of Turkey with ECtHR Judgment (78/4.4). Turkey had not complied with a court judgment concerning violation of Art 5 of the ECHR. See also Written Question 400 Mr Naggy: Rights of National Minorities (80503.16). After Written Question 378 of 10 September 1978, seeking explanation on the length of time necessary for full execution of judgments, the Committee of Ministers explained that it depends on the extent of reform, difficulties encountered by member states and the need to wait for the outcome of similar cases.

106 Parliamentary Assembly, 'Implementation of Decisions of the European Court of Human Rights' Resolution 1268 (2002) (22 January 2002) 10.

107 For example, Commissioner for Human Rights, 'Human Rights and Gender Identity' Issue Paper (2009); Commissioner for Human Rights, 'Safeguarding Human Rights in Times of Economic Crisis' Issue Paper (2013); and Commissioner for Human Rights, 'Democratic and Effective Oversight of National Security Services' Issue Paper (2015). Some of the opinions issued are Commissioner for Human Rights, 'Opinion of the Commissioner for Human Rights: Working Document Concerning the Protection of Human Rights and Dignity of Persons with Mental Disorder with regard to Involuntary

## The Directorate of Human Rights

The Committee is also assisted by the Directorate of Human Rights in discharging its duties in terms of the European Convention. The Directorate considers the measures that should be taken to execute the judgment and also gives an opinion and advice upon the request of the Committee. Where the European Court awards just satisfaction, the Directorate gives details relating to deadlines, the beneficiaries, the currency, and default interest.

## Evaluation of the European Human Rights System

The monitoring and supervision mechanisms under the European human rights system are well established and specialised. Europe's mechanisms have clear working methods suited to their competences and recognised expertise and professionalism.<sup>108</sup> In addition, the mechanisms are effective, detailed and targeted to the extent that the Council of Europe is able to detect instances of non-compliance and propose solutions or address recommendations to each of its member states.<sup>109</sup> In its mission of overseeing the execution of the judgments of the European Court, the Committee has complemented various organs and bodies, in consonance with the need to ensure human rights and fundamental freedoms. Although non-compliance with the court's judgment is still an issue in Europe, the enforcement mechanisms have managed to improve legislation and the lives of citizens. This is different from the scenario in Africa where the mechanisms have not improved the lives of citizens, legislation, and practice.

Generally, there is more compliance with the judgments of the European Court. The Committee has succeeded in using peer pressure to induce a sense of belonging to a community of like-minded states to accept the obligation to remedy human rights violations. The major difference between the European and the African human rights system is that in Europe, human rights are protected as 'community' concepts arising from the European Union system.<sup>110</sup> Compliance with the judgments of the European Court is easier because the governments in European countries are like-minded and have a common heritage of political traditions, ideals, freedom and the rule of law. They share the same vision of taking steps for the collective enforcement of certain rights stated in the Universal Declaration.<sup>111</sup> For example the United Kingdom has

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Placement and Involuntary Treatment' CommDH (2015) December 2015; and Commissioner for Human Rights, 'Opinion of the Commissioner for Human Rights on National Structures for Promoting Equality' CommDH (2011) 2, 21 March 2011.

108 Directorate General Human Rights and the Rule of Law, 'Practical Impact of the Council of Europe Monitoring Mechanisms in Improving Respect for Human Rights and the Rule of Law in Member States' (Council of Europe 2014) 8.

109 *ibid.*

110 Tahwida Ahmed and Israel de Jesus Butler, 'The European Union and Human Rights: An International Law Perspective' (2006) 17 *The European JIL* 771, 772.

111 See the Preamble of the European Convention.

domesticated the European Convention in its Human Rights Act.<sup>112</sup> This is different from the African system where political leaders overemphasise state sovereignty, non-interference and have dictatorial tendencies.<sup>113</sup> In most cases, states sign treaties not because they share the same vision of human rights and fundamental freedoms, but because signing them might result in material economic, political or diplomatic benefits.<sup>114</sup>

## Borrowing from the European Human Rights System

Some mechanisms meant to ensure the execution of judgments of the African Court are similar to the mechanisms under the European human rights system. For example the African human rights system has the Executive Council which has the same function as the Committee which monitors the execution of judgments. It should be noted that the mechanisms which monitor the execution of the European Court's judgments are more effective and holistic. Several cues can be taken from the European human rights system.

## The African Union

In Africa, the African Union must use its coercive force to create a more effective mechanism for reporting and follow up with judgments. Coercive force may be used to adopt time frames for compliance, and list the steps that must be taken to comply with the judgment. In addition, the African Union must be proactive in enforcing the judgments of the court, in particular, invoking the provisions of Article 23(2) of the Constitutive Act and imposing sanctions such as the denial of communication and transport links with other member states as well as other measures of a political and economic nature.

The like-mindedness of European states is a commendable behaviour to emulate. Member states must respect the decisions of the African Court without waiting for the African Union to use its powers of applying sanctions. The member states must feel obliged to abide by the judgments of the African Court. African states must adopt a culture of democracy which allows individuals to participate in all stages of law making, legislation and implementation.<sup>115</sup> There must be social dialogues between individuals and the state in order to facilitate post litigation discussion, follow up and pressure for implementation.<sup>116</sup> Furthermore, the African Union must introduce mechanisms of

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112 Human Rights Act Chapter 42.

113 Cole (n 34).

114 Tiyanjana Maluwa, 'Ratification of African Union Treaties by Member States: Law, Policy and Practice' (2012) 13 Melbourne JIL 1, 9.

115 Kufuor (n 37) 10. Cole (n 34) 40.

116 *ibid* Kufuor 10.

social influence such as inducement, persuasion and acculturation.<sup>117</sup> In order to encourage states to abide by the judgments of the African Court, material incentives such as costs or benefits like the imposition of a fine may be introduced. If the state's conduct costs it financially, it will desist from future violations especially where the cost of continuous violation outweighs the benefits. Acculturation is where states adopt the beliefs and behaviour patterns of the surrounding culture.<sup>118</sup> Acculturation will help to achieve the like-mindedness which has achieved greater execution of judgments in Europe than in Africa. In persuasion, the African Union must explore the use of diplomatic pressure to force states to enforce judgments.

### *Proactive Executive Council*

The Executive Council may continue monitoring the execution of judgments but should be allowed to issue regulations or direction or to determine the appropriate action to be taken through working groups specifically created for ongoing supervision of the execution of the court's judgments. This may be done by exercising the powers of the Executive Council under Rule 5(1)(n) of the Rules of Procedure of the Executive Council. In addition, the Executive Council must require written or annual reports on what the state has done to comply with a judgment or call on the designated authority responsible for the execution of judgments to appear before it and explain why a judgment has not been complied with. A country must remain on the agenda of the Executive Council until the judgment is executed.

Furthermore, the Executive Council needs to be more proactive or aggressive in their monitoring mandate and desist from the brotherhood culture in which the Assembly shies away from criticising states all in the spirit of non-interference in the internal affairs of other countries. The Executive Council may issue press releases and memoranda on the execution of judgments. Furthermore, it may publicise difficulties faced in exercising its mandate of enforcing compliance with court judgments.

### *Adoption of Working Methods*

There is a need for the African human rights system to adopt clear working methods. The working methods must be detailed, effective and targeted. One of the working methods which can be borrowed from the European human rights system is the two-track supervision model. For example, in the standard procedure, the Executive council may insist that the state must have an action plan which shows the general and individual measures to be implemented in order to abide by the African Court's judgment. Where a case requires urgent measures, the Executive Council may invoke the enhanced

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117 Veronika Fikfak, 'Changing State Behaviour: Damages before the European Court of Human Rights' (2018) 29 *The European JIL* 1091, 1092–1093.

118 *ibid.*

supervision procedure in which it may take an active role to ensure that the judgment is executed.

## **The African Court**

The African Court can also be proactive, just like its European counterpart. It can indicate the individual and general measures which need to be implemented in order to comply with its judgment especially in cases of systemic violation. In addition, the court should also take control of the implementation of its judgments and must control how domestic courts consider its jurisprudence when applying a new law after a condemnation. To ensure greater execution of judgments, the African Court may adopt pilot judgments and second judgments.

### *Pilot Judgments*

It is common cause that there are systemic or structural problems in Africa. For example, there have been a plethora of applications by convicted prisoners on death row in Tanzania. In the applications, the applicants have sought to stop Tanzania from executing the death penalty sentences.<sup>119</sup> The Rules of Procedure of the African Court may be amended to provide for pilot judgments, to deal with structural or systemic problems giving rise to similar applications. They will help the court to identify the root causes of repetitive cases and serve as a case management tool. In adopting this mechanism, the court may seek the views of the parties involved to confirm that the application has resulted from a structural or systemic problem. After that, the African Court will identify the nature of the problem and identify the remedies the state must implement. Thereafter, the African Court may direct that the remedies be implemented within a specified time. Having done so, the court may then adjourn all similar cases pending the adoption of the remedial measures.

### *Second Judgment*

Just like the European Court, the African Court can issue second judgments, thus playing an active role rather than being a mere administrative organ. Where the court is seized with a case involving the same violations as in a previous application which the court has already delivered a judgment on, the court can issue a second judgment directing the state to implement the measures recommended by the court in the previous case. Such a second judgment could have been applied in the cases involving Tanzania and the abolition of the death penalty.

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119 See the cases of *Armand Guehi v The United Republic of Tanzania* App No 001/2015, *Ally Rajabu and 4 Others v The United Republic of Tanzania* App No 07/2015; and *Habiyalimana Augustino and Mburo Abdulkarim v The United Republic of Tanzania* App No 015/2016.

## Strengthened Human Rights Organs

In Africa, there is a need to strengthen human rights treaty bodies to complement the Executive Council in monitoring the execution of judgments. Some cues can be taken from Europe where the Committee is assisted by the Parliamentary Assembly, the Council of Europe Commissioner for Human Rights, and the Directorate of Human Rights. African human rights treaty bodies which can be strengthened to take the supervision and enforcement roles are the Pan-African Parliament and the Permanent Representatives Committee.

### *Pan-African Parliament*

The Pan-African Parliament, just like the European Parliamentary Assembly, can be a good check-and-balance system to the Executive Council.<sup>120</sup> It must be empowered to put the Executive Council to task on failure to ensure the execution of judgments by member states. For example, the Pan-African Parliament can adopt the European practice of written questions directed to the Executive Council or it can on its own initiative open a monitoring procedure, specifically for countries which refuse to execute judgments and produce reports on the progress the states would have made. It should be noted that the Pan African Parliament has the power to examine, discuss or express an opinion on any matter either on its own initiative or at the request of the Assembly to make recommendations on matters involving human rights, rule of law and good governance.<sup>121</sup> To that end, it can foster execution of judgments by discussing states' failure to implement the court's judgments and it can recommend sanctions against states which have not executed the judgments. Similarly, the Pan-African Parliament can use its legislative powers to recommend amendments to the Protocol and to remove the optional jurisdiction provision in order to allow individuals and NGOs to access the African Court.

### *The Permanent Representatives Committee*

European organs like the Council of Europe Commissioner for Human Rights or the Directorate for Human Rights may be emulated. There is a need to ensure that there is an African organ which gives opinions and advise on execution of judgments. One of the African organs which can exercise such a role is the Permanent Representatives Committee.<sup>122</sup> This organ can contribute to enforcement of judgments by making

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120 The Pan-African Parliament was established by the Treaty Establishing the African Economic Community and is a platform for states to discuss and make decisions on problems facing the African Continent.

121 Article 11(1) of the Protocol to the Treaty Establishing the Africa Economic Community Relating to the Pan-African Parliament.

122 The Permanent Representatives Committee is composed of representatives of member states accredited to the African Union and other accredited plenipotentiaries. It prepares the work of the Executive Council.



recommendations on execution of judgments and can be the Executive Council's consultative body which ensures that states which have not enforced judgments remain on the agenda of the Executive Council.<sup>123</sup>

## **Amendment of the Protocol**

The Protocol must be amended to have a provision which creates a special judicial enforcement regime in which domestic courts and national human rights institutions can play a part in enforcement of judgments of the African Court. In that regard, African states must build the capacity of domestic courts so that they can enforce decisions from supranational courts. The lack of domestic enforcement mechanisms is a significant obstacle to the enforcement of the African Court's judgments. Domestic and international courts must complement each other and it is unfortunate that the principles of the African Union have not influenced member states. In addition, there must be a special provision in the Protocol giving states a deadline within which to comply with the African Court's decisions. The same provision must also specify the timeframe within which sanctions should be implemented by the Assembly after the expiry of the compliance period.

Furthermore, African states must adopt the African Charter and the African Union instruments to be part of their domestic legal order so that the decisions of the African Court become law. Once the African Charter and the Protocol become domestic law, their norms will have legal effect and directly influence domestic courts. Victims will thus be able to approach local courts and this will reduce the workload of the African Court. Moreover, the Protocol should have an express provision requiring member states to pass legislation for the expedient enforcement of the court's judgments. Similarly, the Protocol should have a provision which allows victims of human rights violations to enforce the African Court's decisions in domestic courts. This will make it easier for victims to recover damages. In line with this, the Protocol must be amended to allow individuals and NGOs to approach the court.

## **Conclusion**

The achilles of the African human rights system is its enforcement and follow-up mechanisms. Non-compliance with the African Court's judgments has hampered its effectiveness. The African supervision and follow-up mechanisms lack detail, elaboration, coherence, and clarity. They need to be more robust and holistic to ensure that monitoring continues until the judgment is complied with. Organs like the African Union and the Executive Council must use their coercive force and impose sanctions against non-complying states. The African Union must amend the Protocol to allow individuals and NGOs to approach the African Court. On their part, the African states

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123 Article 21 of the Constitutive Act.

must domesticate African human rights instruments so that enforcement of the African Court's judgments can be done through domestic courts. Additionally, the African Court needs to take a proactive role by adopting pilot judgments and issuing second judgments. The Executive Council must have clear working methods like the twin-track mechanism adopted by the Committee. Furthermore, the African human rights organs like the Pan-African Parliament and the Permanent Representative Committee must be strengthened and allowed to play the roles similar to those played by Europe's Parliamentary Assembly, the Council of Europe Commissioner for Human Rights and the Directorate of Human Rights on enforcement of judgments.

## References

- Ahmed T and Butler ID, 'The European Union and Human Rights: An International Law Perspective' (2006) 17 *The European Journal of International Law* <<https://doi.org/10.1093/ejil/chl029>>
- Burstein M, 'The Will to Enforce: An Examination of the Political Constraints upon a Regional Court of Human Rights' (2006) 24 *Berkeley Journal of International Law*.
- Cassel D, 'Does International Human Rights Law Make a Difference?' (2001) 2 *Chicago Journal of International Law*.
- Donnelly J, *International Human Rights* (2nd edn, Routledge, 1998).
- Fikfak V, 'Changing State Behaviour: Damages before the European Court of Human Rights' (2018) 29 *The European Journal of International Law* <<https://doi.org/10.1093/ejil/chy064>>
- Forst D, 'The Execution of Judgments of the European Court of Human Rights: Limits and Ways Ahead' *International Constitutional Law Journal*.
- Kioko B, 'The African Union and the Implementation of the Decisions of the African Court on Human and Peoples' Rights' (2004) 15 *Interights Bulletin*.
- Maluwa T, 'Ratification of African Union Treaties by Member States: Law, Policy and Practice' (2012) 13 *Melbourne Journal of International Law*.
- Murray R, Long D, Ayeni V and Somé A, 'Monitoring Implementation of the Decisions and Judgments of the African Commission and Court on Human and Peoples' Rights' (2017) 1 *African Human Rights Yearbook* <<https://doi.org/10.29053/2523-1367/2017/v1n1a8>>
- Naldi G, 'Observations on the Rules of the African Court on Human and Peoples' Rights' (2014) 14 *African Human Rights Law Journal*.
- Nifosi-Sutton I, 'The Power of the African Court on Human and Peoples' Rights to Order Specific Non-Monetary Relief: A Critical Appraisal from a Right to Health Perspective' (2010) 53 *Harvard Human Rights Journal*.
- Nmehielle VO, *The African Human Rights System: Its Laws, Practice and Institutions—International Studies in Human Rights Series Vol 69* (1st edn, Brill Nijhoff 2001).
- Nwabueze B, *Constitutional Democracy in Africa* (Spectrum Books, 2003).
- Oette L, 'Bridging the Enforcement Gap: Compliance of States Parties with Decisions of Human Rights Treaty Bodies' (2010) 16 *Interights Bulletin*.

Oteng KK, 'Securing Compliance with the Judgments of the ECOWAS Court of Justice' (1996) 8 *African Journal of International and Comparative Law*.

Ouguerouz F, *The African Court on Human and Peoples' Rights: A Comprehensive Agenda for Dignity and Sustainable Democracy in Africa* (Brill 2003).

Paraskeva C, 'The Relationship Between the Domestic Implementation of the European Convention on Human Rights and the Changing Reforms of the European Court of Human Rights (with a case study on Cyprus and Turkey)' 2010 *Insentia*.

Peter CM, 'The Proposed Court of Justice—Jurisprudential, Procedural, Enforcement Problems and Beyond' (1993) 1 *East African Journal of Peace and Human Rights*.

Posner E and Yoo J, 'Judicial Independence in International Tribunals' (2005) 93 *California Law Review*.

Rees G, 'The Effect of Decisions and Judgments of the European Court of Human Rights in the Domestic Legal Order' (2005) *Texas International Law Journal*.

Rowland C, 'The African Court on Human and Peoples' Rights: Will Political Stereotypes Form an Obstacle to the Enforcement of its Decisions?' (2010) 43 *Comparative and International Law Journal of Southern Africa*.

Ssenyonjo M, 'Responding to Human Rights Violations in Africa: Assessing the Role of the African Commission and Court on Human and Peoples' Rights (1987-2018)' (2018) 7(1) *International Human Rights Law Review* <<https://doi.org/10.1163/22131035-00701003>>

Starr S, 'Rethinking "Effective Remedies": Remedial Deference in International Courts' (2008) 83 *New York University Law Review*.

Suchkov M, 'An Analysis of the Institutional Arrangements with the Committee of Ministers and Within Certain Member States for Securing Enforcement of Judgments' 2011 *European Human Rights Law Review*.

Viljoen F and Louw L, 'State Compliance with the Recommendations of the African Commission on Human and Peoples' Rights, 1994-2004' (2007) 101 *The American Journal of International Law* <<https://doi.org/10.1017/S000293000002950X>>

Viljoen F, *International Human Rights Law in Africa* (Oxford University Press 2007) <<https://doi.org/10.1093/acprof:oso/9780199218585.001.0001>>

## Cases

*African Commission on Human and Peoples' Rights v Republic of Kenya* App No 006/2012.

*African Commission on Human and Peoples' Rights v Great Socialist Peoples' Libyan Arab Jamahiriya* App No 004/2011 (25 March 2011).

*African Commission on Human and Peoples' Rights v Libya* App No 003/2013.

*Alisic and Others v Bosnia and Herzegovina, Croatia, the former Yugoslav Republic of Macedonia, Serbia and Slovenia* ECHR App No 60642/08 (ECHR 16 July 2014).

*Ally Rajabu and 4 Others v The United Republic of Tanzania* App No 07/2015.

*Armand Guehi v The United Republic of Tanzania* App No 001/2015.

*Assanidze and Others v Georgia* App No 71503/01 (ECHR 8 April 2004) II.

*Ben Yaccoub v Belgium Series* App No 9976 (ECHR, 22 November 1987).

*Brumarescu v Romania* App No 28342/95 (ECHR 28 October 1999) 2001-1.

*Corfu Channel Case (UK v Albania)* (Merits) [1949] ICJ Rep.

*De Vilde, Ooms and Versyp (Vagrancy cases) v Belgium [Plenary] (Just Satisfaction)* App No 2832/66, 2835/66, 2899/66 (ECHR 10 March 1972).

*Driza v Albania* App No 10810/05, ECHR 2007-V.

*Erodius Rulachura and Nine Others v Tanzania* App No 004/2016.

*Fabris v France* App No 16574/08 (ECHR 4 April 2012).

*Final Resolution in Stran Greek Refineries and Stratis Andreadis v Greece* (Final Resolution DH (97) 184).

*Golder v The United Kingdom [Plenary]* App No 4451/70 (ECHR 21 February 1975).

*Greens and M.T v The United Kingdom* Apps No 6004/08 and 60054/08 (ECHR 23 November 2010).

*Guillaume Kigbafori and Others v the Republic of Côte d'Ivoire* App No 012/20.

*Habiyalimana Augustino and Mburo Abdulkarim v The United Republic of Tanzania* App No 015/2016.

*Hutten-Czapska v Poland* App No 35014/97 (ECHR 19 June 2006).

*Illascu and Others v Moldova and Russia* App No 48787/99 (ECHR 8 July 2004) VII.

*John Lazaro and Eight Others v Tanzania* App No 003/2016.

*Lohelssa Konate v Burkina Faso* App No 004/2013.

*Loizidou v Turkey* App No 15318/89 (ECHR 18 December 1996).

*Marckx v Belgium* Series (ECHR 13 June 1979).

*Matthews v the United Kingdom* App No 24833/94.

*Moreira de Azevedo v Portugal (Article 5)* App No 11296/84 (ECHR 28 March 1991).

*Omojudi and A.W. Khan v The United Kingdom* App No 1820/08 (ECHR 31 January 2006).

*Oneryiliz v Turkey* App No 48939/99 (ECHR 18 June 2002).

*Reverend Christopher Mtikila v Tanzania* App No 009& 011/2011 (14 June 2013).

*Ringeisen v Austria* App No 2614/65 (ECHR 16 July 1971).

*Rodrigues Da Silva and Hoogkamer v Netherlands* App No 50435/99 (ECHR 31 January 2006).

*Segdovic v Italy* App No 56581/00 (ECHR 1 March 2006) II.

*The Social and Economic Rights Action Center et al v Nigeria* Communication No. 155/96 (2001).

*Sunday Times v UK (Article 50)* App No 6538 (ECHR 6 November 1980) 44.

*Vermeire v Belgium Series* App No 6833/74 (ECHR 13 June 1979) 214-C.

*Wilfred Onyango Nganyi and Nine Others v Tanzania* App No 006/2013.

*Xenides-Arestis v Turkey* App No 46347/99 (ECHR 22 December 2005).

## International Treaties and Conventions

African Court, 'Interim Report of the African Court Notifying the Executive Council of Non-Compliance by a State' (Interim Report on Libya) 17 May 2013.

Organisation of African Unity (OAU) 'African Charter on the Rights and Welfare of the Child' (OAU Addis Ababa 29 November 1999) CAB/LEG/24.9/49.

African Union, Protocol on the Statute of the African Court of Justice and Human Rights' (Sharm El-Sheikh 1 July 2008).

African Union, Decision on the Peaceful Resolution of the Libyan Crises, Extraordinary Assembly of the Union on the state of Peace and Security in Africa Ext/Assembly, AU/Dec (01.2011).

African Union, 'Interim Report of the African Court on Human and Peoples' Rights Notifying the Executive Council of Non-Compliance by a State' in accordance with Article 31 of the Protocol.

Mid-Term Report of the African Court on Human and Peoples' Rights (1 January–30 June 2017).

Organisation of African Unity 'Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights' (OAU Addis Ababa 2004) OAU/LEG/MIN/AFCHPR/PROT.(1) Rev.2.

Rules of Procedure of the Executive Council ASS/AU/2(I)-(b).

Committee of Ministers of the Council of Europe 'Recommendation on the Re-examination or Re-opening of Certain Cases at Domestic Level Following Judgments of the European Court of Human Rights' Rec (2000) 2 (19 January 2000).

Committee of Ministers of the Council of Europe, 'Recommendation on Efficient Domestic Capacity for Rapid Execution of Judgments of the European Court of Human Rights' CM/Rec (2002) 2 (6 February 2008).

Committee of Ministers of the Council of Europe, 'Supervision of the Execution of Judgments and Decisions of the European Court of Human Rights: Implementation of the Interlaken Action Plan/; Modalities of a Twin-Track Supervision System' CM/Inf/DH (2010) 37 (6 September 2010).

Council of Europe, Protocol 14 to the European Convention for the Protection of Human Rights and Fundamental Freedoms Amending the Control System of the Convention, 13 May 2004, CETS 194.

Committee of Ministers 'Interim Resolution' CM/ResDH (2010) 33 (4 March 2010).

Committee of Ministers, 'Interim Resolution' DH (96) 251.

Committee of Ministers, 'Interim Resolution' Res-DH (2001) 79 of 26 June 2001.

Committee of Ministers of the Council of Europe, 'Albania: Progress in the Execution of Judgments of the European Court of Human Rights Concerning Problems Relating to the Functioning of Justice' 934 (Press Release, 8 December 2009).

Commissioner for Human Rights, 'Human Rights and Gender Identity' Issue Paper (2009).

Commissioner for Human Rights, 'Safeguarding Human Rights in Times of Economic Crisis' Issue Paper (2013).

Commissioner for Human Rights, 'Democratic and Effective Oversight of National Security Services' Issue Paper (2015).

Commissioner for Human Rights, 'Opinion of the Commissioner for Human Rights: Working Document Concerning the Protection of Human Rights and Dignity of Persons with Mental Disorder with regard to Involuntary Placement and Involuntary Treatment' CommDH (2015) December 2015.

Commissioner for Human Rights, 'Opinion of the Commissioner for Human Rights on National Structures for Promoting Equality' CommDH (2011)2 21 March 2011.

Committee on Legal Affairs and Human Rights, Sixth Report, 'Implementation of Judgments of the European Court of Human Rights' Document 11020 (18 September 2006).

Directorate General Human Rights and the Rule of Law, 'Practical Impact of the Council of Europe Monitoring Mechanisms in Improving Respect for Human Rights and the Rule of Law in Member States' (Council of Europe 2014) 8.

European Convention on Human Rights, Rome 4 XI.

Interim Resolution DH (88) 13 of 29 September 1988.

Interim Resolution Res DH (2001) 79 of 26 June 2001.

Parliamentary Assembly, 'Implementation of Decisions of the European Court of Human Rights' Resolution 1268 (2002) (22 January 2002) 10.

Resolution 1226 (2000) Execution of Judgments of the European Court of Human Rights, adopted by the Parliamentary Assembly on 28 September 2000 at its 30th sitting.

UNGA 'Basic Principles and Guidelines on the Right to a Remedy for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law' (16 December 2005) UN Doc A/res/60/147 VII.

Written Question No.402 Mr Clerfayt on the Non- Compliance of Turkey with ECtHR Judgment (78/4.4).

Written Question 400 Mr Naggy: Rights of National Minorities (80503.16).